

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Kathleen C. Murphy)
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Filing Date: November 19, 2019) Case No.: FIA-20-0010
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Issued: December 6, 2019

Decision and Order

On November 19, 2019, Kathleen C. Murphy (Appellant), appealed a Determination Letter issued to her from the Department of Energy’s (DOE) Office of Public Information (OPI) regarding Request No. HQ-2019-00635-F. In that determination, OPI responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. OPI withheld portions of responsive records pursuant to FOIA Exemption 6. The Appellant challenged the decision to withhold information pursuant to Exemption 6. The Appellant also sought to have questions answered. In this Decision, we deny the appeal.

I. BACKGROUND

On March 21, 2019, the Appellant filed a request with OPI for “any non-DOE websites accessed by [her deceased son,] Timothy F. Murphy[,] on or after 10/29/18.” Determination letter from Alexander C. Morris to Kathleen C. Murphy at 1 (September 5, 2019). By email dated July 10, 2019, Appellant agreed to a proposal by OPI to narrow the search to nine documents. Email from Kathleen C. Murphy to Michael Snytkin at 1 (July 10, 2019).

On September 5, 2019, OPI issued an initial determination and provided Appellant with nine partially-redacted, computer-generated reports responsive to her FOIA request. Each document was organized as a spreadsheet and included the URL of a webpage visited by Mr. Murphy, some of which were redacted and marked with a “(b)(6)” stamp. In the Determination Letter, OPI explained that portions of the documents were withheld pursuant to Exemption 6 of the FOIA. Determination Letter at 1–2.

On November 19, 2019, the Appellant submitted an Appeal to the DOE’s Office of Hearings and Appeals (OHA). In her Appeal, the Appellant challenged OPI’s redaction of portions of URLs that are “in the public domain,” alleged that the records provided were incomplete based upon blank fields contained within the spreadsheets, and requested that OPI answer questions she posed concerning the interpretation of information contained in the spreadsheets. Appeal at 1–2. In her Appeal, the Appellant also requests that OHA require OPI to “[p]rovide rational[e] for redacting information that is in the public domain.” Appeal at 2.

II. ANALYSIS

A. Exemption 6

Exemption 6 of the FOIA exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). As a threshold matter, the record must be personnel, medical, or other similar files. *Id.* After it is determined that the information falls into one of those categories, the agency must determine whether the record may be withheld based on an application of a three-part test. In applying this test, the agency must first determine whether the disclosure of the record would compromise a significant privacy interest. *Ripskis v. Dep’t of Hous. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). If no such privacy interest exists, then the agency may not withhold the record based on this exemption. *Id.* If the agency determines that a privacy interest does exist in the record, the agency must then decide if the release of the record would serve the interest of the public by shedding “light on an agency’s performance of its statutory duties” *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). The agency must then determine whether “the potential harm to privacy interests from disclosure [would] outweigh the public interest in disclosure of the requested information” *Ripskis*, 746 F.2d at 3.

In this case, OPI redacted two types of information pursuant to Exemption 6: (1) the names of third parties which appear in Mr. Murphy’s browser history; and (2) search terms and words that appear in URLs as part of Mr. Murphy’s browser history. We consider the privacy interests implicated by each type of information separately.

a. Mr. Murphy’s Privacy Interests

The U.S. Supreme Court has established that the concept of privacy under Exemption 6 implicates control over one’s own personal information. *Reporters Comm.*, 489 U.S. at 763. Further, the Court of Appeals for the D.C. Circuit determined that this concept of privacy protects “the prosaic (e.g., place of birth and date of marriage) as well as the intimate and potentially embarrassing.” *Painting & Drywall Work Pres. Fund, Inc. v. HUD*, 936 F.2d 1300, 1302 (D.C. Cir. 1991). “An individual’s death diminishes, but does not eliminate, his privacy interest in the nondisclosure of any information about him” *Vest v. Dep’t of the Air Force*, 793 F.Supp. 2d 103, 122 (D.D.C. 2011). Furthermore, “[t]he fact of death, [] while not requiring the release of information, is a relevant factor to be taken into account in the balancing decision whether to release information.” *Schrecker v. DOJ*, 254 F.3d 162, 166 (D.C. Cir. 2001).

In this case, portions of some of the listed URLs were redacted in the responsive record. The redacted portions of the various URLs provide a clear description of the kind of information Mr. Murphy was gathering, and that information is, by its very nature, intimate and potentially embarrassing. *See Curran v. USPS*, 2019 WL 464137 at 6 (E.D. Wisc. 2019) (finding that agency employees “have a significant privacy interest with regard to the public disclosure of their internet search history.”).

Against Mr. Murphy’s privacy interest in the non-disclosure of records of his personal search history, the Appellant has not identified any public interest that disclosure of these records would serve. Thus, “[w]e need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time.” *Nat’l Ass’n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). Having found a privacy interest in the redacted material, and absent

any public interest in its disclosure, we conclude that OPI appropriately redacted the records of Mr. Murphy's search history pursuant to Exemption 6.

b. Third-Party Privacy Interests

OPI's redactions to Mr. Murphy's search history pursuant to Exemption 6 also withheld third-party information. Third-party information is information in which an individual has a privacy interest, and as a threshold matter, is a "similar file" to which Exemption 6 refers. *U.S. Dep't of State v. Wash. Post. Co.* 456 U.S. 595, 602 (1982). OHA has previously found that persons named in a record have a significant privacy interest in the non-disclosure of their names if such disclosure is likely to subject them to harassing contacts. *Matter of Future Systems Enter.*, OHA Case No. FIA-19-0007 at 3-4 (2019).¹ Appellant's purpose in seeking the requested records is to understand Mr. Murphy's state of mind at the time that he performed the internet searches reflected in the records. Appeal at 1. Thus, we find it likely that Appellant would attempt to contact the persons named in the records to better understand Mr. Murphy's state of mind, and therefore conclude that the persons named in the records have a significant privacy interest in the non-disclosure of their names.

As the names of persons who appear in Mr. Murphy's browser history are private information contemplated by Exemption 6, we must determine whether the release of this information would serve in the interest of the public. It is unlikely the release of this third-party information would serve in the interest of the public, as the release of this information would not elucidate the agency's performance of its duties. *Associated Press v. DOD*, 554 F.3d 274, 293 (2d Cir. 2009). Therefore, we find that the redacted portions of the records were appropriately withheld pursuant to Exemption 6.

B. Other Appeal Grounds

The Appellant asks for definitions of technology terms to interpret data contained in the records provided to her by OPI, and she indicates this information can be provided to her via writing or telephone conversation. Appeal at 1-2. The Appeal also states that "[t]he use of Coordinated Universal Time without conversion to Eastern Standard time is confusing and misleading. *Id.* The Appellant asks that the accuracy of "the gap in time between 10:45 PM 10/29/18 to 12:16 PM 10/30/18 (UTC)" be confirmed, so that she can be sure it is not a "loss of data." *Id.* at 2.

In *Hudgins v. IRS*, the court provides that "[u]nder FOIA an individual may only obtain access to records 'written or transcribed to perpetuate knowledge or events.'" *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C 1985) (citing *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978)). The court made clear that FOIA does not "require[] an agency to answer questions disguised as a FOIA request or to create documents or opinions in response to an individual's request for information." *Id.* at 21.

As FOIA does not require the agency to provide answers to questions or to define terms, and as the OPI provided the Appellant with the agreed-upon and appropriately redacted records, we find that the Appellant's appeal should be denied.

¹ Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/oha>.

III. ORDER

It is hereby ordered that the Appeal filed on November 19, 2019 by Kathleen C. Murphy, FIA-20-0010, is denied.

This is a final order of the Department of Energy from which an aggrieved party may seek judicial review to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situation, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect one's right to pursue litigation. OIGS may be contacted in any of the following ways:

Office of Government Information Services
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